

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7508

Petition of Georgia Mountain Community Wind, LLC,)
for a certificate of public good, pursuant to 30 V.S.A.)
Section 248, authorizing the construction and operation)
of a 5-wind turbine electric generation facility, with)
associated electric and interconnection facilities, on)
Georgia Mountain in the Towns of Milton and Georgia,)
Vermont, to be known as the "Georgia Mountain)
Community Wind Project")

Order entered: 2/2/2010

**ORDER RE: MOTION TO EXCLUDE PREFILED TESTIMONY
AND REQUEST TO ALLOW ADDITIONAL TESTIMONY**

I. INTRODUCTION

On January 21, 2010, Georgia Mountain Community Wind , LLC ("GMCW") filed a motion to exclude portions of the January 4, 2010, prefiled rebuttal testimony of Daniel FitzGerald and the jointly filed prefiled rebuttal testimony of Daniel and Tina FitzGerald. In addition, GMCW also requests that the Public Service Board ("Board") reject Daniel FitzGerald's request to allow the testimony of Dr. Nisenbaum on noise issues.

In this Order, we grant GMCW's motion to exclude portions of the FitzGeralds' testimony, as well as certain prefiled exhibits. In addition, we deny Daniel FitzGerald's request to allow the testimony of Dr. Michael Nisenbaum.

Motion to Exclude

GMCW requests that the Board exclude portions of Mr. FitzGerald's testimony regarding David Raphael, GMCW's witness on aesthetics, as well as certain weblinks contained in Daniel and Tina FitzGerald's jointly filed testimony and several exhibits filed with the FitzGerald's testimony. In addition, GMCW requests that the Board deny Mr. FitzGerald's request to allow testimony by Dr. Nisenbaum. We address each of these issues separately, below.

Raphael Report

Mr. FitzGerald's January 4 testimony states that Mr. Raphael had previously served as an aesthetics witness for the Town of Milton with respect to a proposed telecommunications tower on Georgia Mountain and contends that Mr. Raphael's statements with respect to the telecommunications project are inconsistent with Mr. Raphael's testimony in this case.

GMCW contends that the testimony should be excluded as false and misleading, and filed an affidavit from Mr. Raphael stating that he did not perform a visual assessment of Georgia Mountain for the Town of Milton. GMCW states that the probative value of the objected-to testimony is outweighed by its prejudicial effect. GMCW further argues that, "because these false claims were offered expressly for the purpose of challenging Mr. Raphael's credibility as an expert . . . , its admission would wrongly subject him to harassment and undue embarrassment." Finally, GMCW contends that, even if the testimony was admissible, it should have been filed in direct testimony rather than rebuttal testimony.

Mr. FitzGerald asserts that the testimony regarding Mr. Raphael is pertinent and relevant. In addition, Mr. FitzGerald states that he was not aware of the existence of this information at the time he prepared his direct testimony. Finally, Mr. FitzGerald states that the information regarding Mr. Raphael is not intended to embarrass or harass the witness, but to bring forth pertinent facts.

GMCW has not provided sufficient basis to exclude as prejudicial Mr. FitzGerald's testimony related to Mr. Raphael's involvement in a visual assessment of a telecommunications tower on Georgia Mountain. The fact that an assertion in prefiled testimony may be incorrect is not sufficient basis to exclude such testimony; if that were an appropriate objection, the Board's decisions could be made entirely through motions to exclude. Further, GMCW has not demonstrated that Mr. FitzGerald's testimony will subject Mr. Raphael to undue embarrassment or harassment; as GMCW states in its motion, Mr. Raphael has "years of experience providing expert testimony to this Board and in other forums." Expert witnesses routinely must respond to challenges regarding their findings and credibility while on the stand. It is common practice to challenge a witness's credibility during cross-examination by reference to a previous statement made by that witness that is potentially inconsistent with the testimony being provided. The

information contained in Mr. FitzGerald's prefiled testimony could legitimately be used during cross-examination to challenge the credibility of Mr. Raphael's testimony in this Docket; Mr. Raphael could then address whether that information bears on the credibility of his testimony in the current proceeding, and Mr. Raphael's lawyer could further explore the matter during redirect examination.

GMCW's contention that Mr. FitzGerald's testimony should have been included in direct rather than rebuttal testimony is, however, correct. As GMCW points out, the events described in Mr. FitzGerald's testimony occurred prior to the filing of the petition; accordingly, filing such testimony at the rebuttal stage is untimely, and we exclude the evidence from Mr. FitzGerald's prefiled rebuttal testimony for that reason. However, we are not at this time precluding the possible use of such information during cross-examination of Mr. Raphael.

Weblink references and exhibits

GMCW requests that the Board exclude the weblinks contained in the prefiled rebuttal testimony of Daniel and Tina FitzGerald, as well as exhibits A, B, I, J, and K, attached to the prefiled testimony. GMCW objects to the admission of the links to the extent that they are meant to incorporate other documents into the testimony. GMCW contends that the identified exhibits, as well as the weblinks, are hearsay, impermissible lay opinion evidence, and irrelevant. In addition, GMCW contends that there has been insufficient foundation or authentication of the exhibits, and that any probative value of the material is outweighed by the confusion and prejudicial effect of the material.

The FitzGeralds assert that the exhibits in question are relevant to their case and that exclusion of the documents would create an injustice to the FitzGeralds.

The weblinks contained in the prefiled testimony create uncertainty regarding the material that is included in the prefiled testimony. The information contained on a website can change over time, and if a weblink were allowed into the record now, there is no guarantee that the information referenced in the weblink would be the same in the future. In addition, for the reasons expressed below, we find that the content of most of the weblinks referenced in the

FitzGerald's testimony constitute hearsay and must be excluded. Accordingly, we exclude these weblinks from the testimony.

The exhibits that GMCW objects to are: Exhibit A, an Executive Summary of a 1988 report addressing ground water problems associated with blasting in South Carolina; Exhibit B, a letter from the Industrial Wind Action Group to an individual at the Maine Department of Environmental Protection that raises issues regarding noise-modeling software and the methodology of collecting sound levels; Exhibit I is not identified, but appears to address noise levels of residential wind turbines; Exhibit J appears to be a newspaper article that describes a person's experience with wind turbines near her residence; and Exhibit K is described as a WindAction editorial addressing concerns with noise from wind turbines.

The Board is required by the Administrative Procedures Act to utilize the Vermont Rules of Evidence ("VRE") in contested-case proceedings such as this.¹ Each of the exhibits objected to constitutes an out-of-court statement offered for the truth of the matter asserted, and therefore is hearsay as defined in VRE 801 and inadmissible under VRE 802. With the exception of Exhibit A, the exhibits do not appear to fit within the hearsay exceptions contained in VRE 803. Accordingly, we grant GMCW's request to exclude exhibits B, I, J, and K. In addition, portions of the FitzGerald's prefiled testimony appears to be copied from the contents of the exhibits; to the extent that the exhibit is excluded from evidence, we also exclude the portions of the prefiled testimony that are copied from the excluded exhibits.

Exhibit A is the executive summary of a report by the South Carolina Department of Natural Resources regarding an investigation into groundwater problems associated with blasting at a marble quarry, and therefore falls under VRE 803(8) as an exception to hearsay. As GMCW notes, there is a question as to the relevance of the report, given differences in the projects and geological formations involved. However, the Board can determine how much weight to accord the report. In addition, Board practice is not to admit only portions of a report into the evidentiary record, but instead require that the report in its entirety be admitted. Accordingly, the FitzGerald's are required to provide full copies of the report to the Board and any party that requests a copy.

1. 3 V.S.A. § 810(1).

Request to permit late-filed testimony

GMCW recommends that the Board reject Mr. FitzGerald's request to allow Dr. Nisenbaum to file testimony or offer live testimony at the hearings via telephone. GMCW states that Mr. FitzGerald did not provide any justification for his request and contends that Mr. FitzGerald's request is untimely and would be prejudicial to GMCW as, if Mr. FitzGerald's request was granted, GMCW would not have any meaningful opportunity to conduct discovery and cross-examination on Dr. Nisenbaum.

The FitzGeralds contend that the Board should allow Dr. Nisenbaum to testify by telephone at the hearings because the information Dr. Nisenbaum would provide, concerning the health impacts of noise, would substantiate the documents the FitzGeralds produced in their prefiled testimony. The FitzGeralds also assert that the information Dr. Nisenbaum would provide is pertinent and "should be introduced for the good of all."

The schedule that was established in this Docket in a July 17, 2009, Order² established deadlines for filing direct and rebuttal testimony. Although we seek to provide adequate opportunity to provide testimony, we must balance this with the need to ensure that our proceedings occur in an orderly manner that is fair to all parties. The FitzGeralds have not provided a compelling reason for why Dr. Nisenbaum's testimony could not have been provided in accordance with the schedule set forth months ago. The FitzGeralds request to allow Dr. Nisenbaum's late testimony is denied.

Conclusion

For the reasons set forth above, we exclude the following portions of Daniel FitzGerald's prefiled rebuttal testimony and the joint prefiled rebuttal testimony of Daniel and Tina FitzGerald.

Daniel FitzGerald's prefiled rebuttal testimony: question and answer 4, on page 4.

Daniel and Tina FitzGerald's prefiled rebuttal testimony: all weblinks contained in the document; as well as page 2, beginning with the words "According to the link below . . ." through ". . . as it refers to Mars Hill, Maine;" page 4, the words "Links supporting our concerns;" page 6,

2. As modified by a September 14, 2009, scheduling Order.

beginning with the words "Wind Turbine Noise . . ." through "make less noise than a residential air conditioner;" page 6, beginning with the words "Other links about noise below . . ." through page 8, "Member National Council of Acoustical Consultants."

In addition, we exclude the prefiled rebuttal exhibits B, I, J, and K attached to Daniel and Tina FitzGerald's prefiled rebuttal exhibits.

Finally, we deny Daniel FitzGerald's request to allow the late testimony of Dr. Nisenbaum.

So ORDERED.

Dated at Montpelier, Vermont, this 2nd day of February, 2010.

s/James Volz

s/David C. Coen

s/John D. Burke

PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: February 2, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)